TUN DATO' HJ. MOHAMED SALLEH ABAS

v.

TAN SRI DATO' ABDUL HAMID OMAR & ORS.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI SCJ
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED J
GUNN CHIT TUAN J
ANUAR ZAINAL ABIDIN J
[CIVIL APPLICATION NO. 26 OF 1988]
22 JULY 1988

CONSTITUTIONAL LAW: *Whether Tribunal appointed under Article 125(3) of the Constitution can be restrained by an order of Court - Whether tantamount to restraining the Yang di-Pertuan Agong from receiving the report - Whether Attorney General entitled to represent the Tribunal in this proceedings.*

CIVIL PROCEDURE: *Application for leave to intervene by 5 suspended Judges - Grounds of identical issues to be tried - Discretion of Court in granting leave - Whether leave to intervene should be granted in this case.*

The Attorney General applied by way of Origination Motion dated 11 July 1988 to set aside an *ex parte* order dated 2 July restraining the Tribunal appointed under Article 125(3) of the Federal Constitution from submitting any recommendations, report or advice respecting the enquiry concerning Tun Dato' Haji Mohamed Salleh bin Abas until further order.

The Attorney General alleged that the *ex parte* order was wrong in law in any event in the circumstances of the case. This was on the basis that the Supreme Court had no jurisdiction to entertain the application as there was no pending appeal before the Court and that it has no original jurisdiction. The second ground relied on by the Attorney General was that a Tribunal or a body performing constitutional functions under the Constitution should not be prevented from performing their functions and that a body which merely acts as an advisory body is not amenable to an order of Prohibition.

The Court had, at the outset of the proceedings, to consider two applications.The first of the applications was by the five Supreme Court Judges who sat in the Supreme Court which granted the *ex parte* order for leave to intervene in the proceedings on the ground that the issues to be determined in this proceeding would be identical with the issues to be decided by the tribunal in respect to their suspension, which had yet to be appointed.

The second application was an application to strike out the originating motion of the Attorney General on the grounds *inter alia* that the Tribunal appointed under the Constitution was to be independent of the Government and therefore the Attorney General is not entitled to represent them and further that the Attorney General had in fact participated in the proceedings of the Tribunal representing the Government.

Held:

[1] In respect of the application for leave to intervene in the proceedings, leave would be refused because the basis of their application to intervene namely what interpretation is to be given to ss. 38 and 39 of the Courts of Judicature Act is no longer an issue to be decided in the present proceeding as the Attorney General was not proceeding with that ground of his originating motion. Further the Court was of the opinion that since the tribunal is not a Court of law, it was therefore not a proper case for leave to intervene.

[2] The application to strike out the originating motion filed by the Attorney General would also be dismissed on the ground that the Attorney General is a public officer under the Constitution and therefore was required under the rules of Procedure to assist the tribunal. Article 145 of the Constitution gave ample power to the Attorney General to represent any body or persons performing a function under the Constitution.

[3] That Supreme Court is principally an appellate Court with appellate jurisdiction.

[4] The functions of the tribunal is to enquire and investigate the representation and then to report to the Yang di-Pertuan Agong with any recommendation. It merely reports but does not decide and as such it is merely performing a constitutional function and therefore should not be restrained from so doing. Further it is clear that Article 125 entitles the Yang di-Pertuan Agong to receive the report and to allow the order to stand would be tantamount to restraining His Majesty form receiving the report.

[Order set aside.]

Cases referred to:
Re Ong Eng Guan [1959] 25 MLJ 92
Re Chua Ho Ann [1963] MLJ 193
Hj. Salleh bin Jafaruddin v. Datuk Celestine Ujang & Ors. [1986] CLJ (Rep) 142
Sim Kie Chon v. Superintendent of Pudu Prison & Ors. [1985] CLJ (Rep) 293
Superintendent of Pudu Prison & Ors. v. Sim Kie Chon [1986] CLJ (Rep) 256
Election Commission Malaysia v. Abdul Fatah bin Haji Haron [1987] CLJ (Rep) 92
Re Royal Commission on Thomas Case [1980] 1 NZLR 602
Assa Singh v. Menteri Besar, Johor [1969] 2 MLJ 30

Legislation referred to:
Courts of Judicature Act 1964, ss. 38, 39, 39(1)
Federal Constitution, arts. 121(2)(c), 125(3), (5), 145
Rules of the High Court 1980, O. 92(4)
Rules of the Supreme Court 1980, r. 4

For the appellant - Y.M. Raja Aziz Addruse, C.V. Das, P. Royan, V. George, T. Thomas, Z. Zakaria & D. Goon; M/s. Shook Lin & Bok
For the interveners - C. Abraham, W. R. Abraham & Lazar; M/s. Shearn Delamore & Co.
For the respondents - Abu Talib bin Othman, Attorney-General Malaysia & T. Selventhiranathan SFC

JUDGMENT

Hashim Yeop Sani SCJ:

The Attorney-General Malaysia applied by way of notice of motion dated 11 July 1988 to set aside an *ex-parte* order dated 2 July 1988 restraining the tribunal appointed under Article 125(3) of the Federal Constitution from submitting any recommendations, report or advice respecting the enquiry into the representation concerning Tun Dato' Haji Mohamed Salleh bin Abas to His majesty the Yang di-Pertuan Agong until further order. In the Notice of Motion the grounds relied on for the application were -

(1) that the Supreme Court had no jurisdiction to make the aforesaid order by reason of the fact that the Court sat without the direction of the Chief Justice Malaya, who was then and still is exercising the powers of the Lord President, as required by s. 39(1) of the Courts of Judicature Act 1964; and/or

(2) the making of the aforesaid order was wrong in law in any event in the circumstances of the case.

At the outset of the hearing of the notice of motion, the learned Attorney-General informed the Court that in view of the fact that there is an originating summons in the High Court asking for a declaration on the interpretation of ss. 38 and 39 of the Courts of Judicature Act 1964 he was not proceeding on the first ground but would rely solely on the second ground.

Before we dealt with the Notice of Motion of the learned Attorney-General we had earlier in the proceeding dismissed two applications. The first application was by the five Supreme Court Judges who sat in the Supreme Court which issued the *ex-parte* order referred to and who are now suspended by the Yang di-Pertuan Agong under Article 125(5) of the Constitution pending reference of the representation made against them to the Tribunal to be appointed. Their application was for leave to intervene in the proceeding on the grounds that the issues to be determined in the notice of motion of the Attorney-General are "identical" with the issues to be considered by the tribunal yet to be appointed. We refused the leave to intervene because the basis of their application to intervene, namely what interpretation should be given to ss. 38 and 39 of the Courts of Judicature Act is no longer an issue to be decided in this proceeding after the Attorney-General stated that he was not proceeding with ground one of his application.

Apart from the fact that the basis of the application to intervene having been removed we also noted the jurisdiction of the Court to allow intervention is entirely discretionary and in our opinion since the tribunal which is yet to be appointed is not a Court of law, this is not therefore a proper case to allow the leave to intervene.

The second application we refused was the application to strike out the notice of motion of the Attorney-General. This application was made by Tun Haji Mohamed Salleh bin Abas who obtained the *ex-parte* order in question on 2 July 1988. The grounds relied on to strike out the notice of motion of the Attorney-General were firstly, that the tribunal constituted under Article 125(3) of the Constitution is intended to be independent of the government and therefore the Attorney-General is not entitled to represent the members of the tribunal; and secondly, that the Attorney-General had in fact participated in the proceedings of the tribunal representing the government and therefore it is now not competent for him to represent the members of the tribunal. Our short answer to that is that the Attorney-General is a public office under the Constitution. He was required by the rules of procedure of the tribunal to assist the tribunal. Article 145 of the Constitution properly read gives ample power to the Attorney-General to represent the government and any body or persons performing any functions under the Constitution.

Finally we came to the main notice of motion. The Attorney-General submitted that there are two grounds why the *ex-parte* order dated 2 July 1988 was wrong in law. The first ground was that the Supreme Court had no original jurisdiction to entertain applications of that nature since there was no pending appeal before the Supreme Court. The jurisdiction of the Supreme Court is set out in the Constitution and the Courts of Judicature Act 1964. It has no original jurisdiction save in hearing applications in respect of pending appeals. The Attorney-General referred to the certified true copies of the notes of proceedings kept by the five Supreme Court Judges concerned to show that all of them regarded the application before them as "Supreme Court Civil Application No. 26 of 1988" and only in respect of one certified true copy of the record of the proceeding were the words "appellate jurisdiction" mentioned.

The second ground of the Attorney-General to say that the *ex-parte* order date 2 July 1988 was wrong in law was that it has been the consistent view of the highest Court in this country that a tribunal or body performing constitutional functions under the Constitution

should not be prevented from performing their functions and that a body which merely acts as an investigating or advisory body is not amenable to an order of prohibition. He referred to *Re Ong Eng Guan* [1959] 25 MLJ 92, *Re Chua Ho Ann* [1963] MLJ 193, *Hj. Salleh bin Jafaruddin v. Datuk Celestine Ujang and Others* [1986] CLJ (Rep) 142, *Sim Kie Chon v. Superintendent of Pudu Prison and Others* [1985] CLJ (Rep) 293, *Superintendent of Pudu prison and Others v. Sim Kie Chon* [1986] CLJ (Rep) 256 and *Election Commission Malaysia v. Abdul Fatah bin Haji Haron* [1987] CLJ (Rep) 92.

Raja Aziz, on the other hand, relied largely on authorities from foreign jurisdictions, for example, *Re Royal Commission on Thomas* Case [1980] 1 NZLR 602 for the view that the supervisory powers of the Courts can be extended even to Royal Commissions. Raja Aziz would also seem to rely heavily on r. 4 of the Rules of the Supreme Court, 1980 invoking O. 92(4) of the Rules of the High Court, 1980 as conferring jurisdiction to prevent injustice.

Our unanimous view is as follows.

The Supreme Court is principally an appellate Court with appellate jurisdiction. See *Assa Singh v. Menteri Besar, Johor* [1969] 2 MLJ 30. An amendment was made to Article 121(2)(c) of the Federal Constitution effective from 1 January 1985. But no substantive law has been passed by Parliament to confer other powers than those already found in the Courts of Judicature Act, 1964. Therefore there has been no real change since *the Assa Singh* case.

The really vital issue here however is whether an interim order in the nature that we have before us now should have been made at all. To resolve that we have to go back to basic principles.

The functions of the tribunal appointed under Article 125(3) of the Constitution is to enquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function.

Finally, members of the tribunal are appointees of the Yang di-Pertuan Agong. From the language of Article 125 it is clear the Yang di-Pertuan Agong is entitled to the report of the tribunal. To restrain the tribunal from submitting their report is in effect to restrain His Majesty from receiving the report.

On the above grounds it is our view that the restraining order is therefore bad in law, invalid and unenforceable as against the Yang di-Pertuan Agong and the tribunal.

Also found at [1988] 2 CLJ 739